In The

Supreme Court of the United States

October Term 1960

No. 151

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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In The

Supreme Court of the United States

October Term, 1960

No.....

LONETTE SCHWENKHOFF, by
Guardian ad Litem, Vaughn S. Conway,
Petitioner,

vs.

FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioner prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of Wisconsin, which affirmed the judgment of the County Court of Sauk County, Wisconsin, dismissing the complaint of the petitioner by her guardian ad litem, against the respondent.

OPINIONS BELOW

The proceedings have been before the Supreme Court of Wisconsin on two occasions. The first decision is reported at 6 Wis. 2d. 44, 93 N. W. 2d. 867 (1959), and the second decision, which is the basis of this petition, is reported at 11 Wis. 2d. 97, 104 N. W. 2d. 154 (1960). The latter opinion is appended hereto. (pp. 5a to 9a), and the former opinion is set forth in the original record. (pp. 120-125).

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was rendered on June 28, 1960.

Jurisdiction of this Court is conferred by 28 U. S. C. 1257(3).

QUESTIONS INVOLVED

1. Has the unemancipated minor petitioner been deprived of property without due process of law, in violation of Art. *V*, and Art. *XIV*, Sec. 1, of the Amendments to the United States Constitution, by being denied the right to maintain an action for damages for personal injuries against the liability insurance carrier of her father?

2. Has the unemancipated minor petitioner been additionally deprived of property without due process of law, in violation of Art. *XIV*, Sec. 1, of the Amendments to the United States Constitution, by reason of the Supreme Court of Wisconsin failing to properly apply Art. *I*, Sec. 9, and Art. *XIV*, Sec. 13, of the Wisconsin Constitution, to the facts presented herein?

3. Has the unemancipated minor petitioner been denied the equal protection of the laws, in violation of Art. *XIV*, Sec. 1, of the Amendments to the United States Constitution, by being denied the right to maintain an action for damages for personal injuries against the liability insurance carrier of her father.

CONSTITUTIONAL PROVISIONS INVOLVED

1. *Art. V, of Amendments to the United States Constitution:* "No person shall be . . . deprived of life, liberty or property without due process of law."

2. *Art XIV, Sec. 1, of Amendments to the United States Constitution:* ". . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. *Art. I, Sec. 9, Wisconsin Constitution:* "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformable to the laws."

4. *Art. XIV, Sec. 13, Wisconsin Constitution:* "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with the Constitution, shall be and continue part of the law of this state until altered or suspended by the Legislature."

STATEMENT OF THE CASE

On February 2, 1956, petitioner, an unemancipated minor, was a passenger in her father's automobile, insured by the respondent, when a collision took place with a truck owned by Sauk County, a Wisconsin municipality, on a county trunk highway in Sauk County, Wisconsin. The father was not made a party defendant to the proceedings by reason of Wisconsin's direct action statutes permitting actions for damages arising from automobile accidents to be instituted directly against the liability insurance carriers.

The original complaint alleged that the collision occurred by reason of the combined negligence of both drivers involved. The defendants therein filed a demurrer to the complaint, which was sustained by the Wisconsin Supreme Court in *Schwenkhoff v. Farmers Mutual Automobile Insurance Company*, 6 Wis. 44, 93 N. W. 2d. 867 (1959). Leave was granted to the petitioner to plead over.

An amended complaint was served thereafter which set up an additional cause of action alleging that the petitioner was being deprived of her constitutional rights as guaranteed under both the Wisconsin and the United States Constitutions by reason of the Wisconsin Supreme Court denying the existence of a cause of action in favor of the petitioner against her father's liability insurance carrier, and sought relief authorizing her to maintain such proceedings. The federal questions sought to be reviewed herein were raised specifically in the trial court by the allegations contained in the second cause of action of the amended complaint, and were further raised as specific issue on the second appeal to the Wisconsin Supreme Court (11 Wis. 2d. 97, 104 N. W. 2d. 154 (1960). The Wisconsin

Supreme Court in *Schwenkhoff v. Farmers Mutual Automobile Insurance Company*, 11 Wis. 2d. 97, 104 N. W. 2d. 154 (1960) affirmed the judgment of the trial court dismissing the unemancipated minor's cause of action against the respondent.

REASONS FOR GRANTING THE WRIT

It is submitted that the right of an individual, be he a minor or an adult, to recover damages for personal injuries sustained by him caused by the negligence of another, is a property right, and a denial of this legitimate right to recover such damages should be held to be the deprivation of property without due process of law as guaranteed under the provisions of Art. *V*, and Art. *XIV*, Sec. 1, of the Amendments to the United States Constitution.

The provisions of Art. *I*, Sec. 9, Wisconsin Constitution, set forth a guarantee that every individual will be entitled to a "remedy for every wrong." Particular emphasis was placed upon this proposition by Justice Crownhart in his dissenting opinion in *Wick v. Wick*, 192 Wis. 260, 263, 212 N. W. 787 (1927), where he stated that this provision declared a public policy of the state which the courts should not be at liberty to disregard. He further pointed out at page 268 of the opinion that although the courts which had denied an infant a right to sue a parent in tort have grounded their decisions on public policy, such decisions should not be binding on a Wisconsin Court since the other jurisdictions do not have constitutional provisions similar to those of Wisconsin.

The Wisconsin Supreme Court has predicated its most current ruling in 11 Wis. 2d. 97, 101, upon a contention that since the state legislature has not seen fit through the years to enact a bill which would give an unemancipated minor the right to maintain such litigation, an expression of public policy has therefore been made by the legislature for the Court to follow to the effect that no change should be made in the rule. In view of the provisions of Art. *XIV*, Sec. 13, of the Wisconsin Constitution holding that "such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with the Constitution, shall be and continue part of the law of this state until altered or suspended by the Legislature," it is submitted that the effect of the ruling of the Wisconsin Supreme Court is to deprive the petitioner of property without due process of law in violation of the Amendments of the United States Constitution, since the Wisconsin Constitution can only be interpreted to mean that until the state legislature clearly outlaws such a cause of action, such litigation should be permitted. A study of all of the decisions on the subject involved, both in Wisconsin, and all other jurisdictions, clearly discloses the fact that the earliest decision reported anywhere was *Hewlett v. George*, (1891) 68 Miss. 709, 9 So. 885, and followed thereafter by *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664 (1903), and *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905), all of which denied recovery to the minor on the theory that it would be contrary to public policy and holding further that "at common law such an action could not be maintained." Nevertheless, the Wisconsin Supreme Court in the *Wick* case at page 261, clearly stated and indicated that it was satisfied that English decisions afforded no precedent

and conceded that there were no cases involving the subject herein which had come on for hearings before any appellate court in England or United States prior to 1891. It is a matter of common knowledge that Wisconsin became a State admitted to the Union many years prior to 1891. Therefore, the failure of the Wisconsin courts to properly consider and apply Art. *XIV*, Sec. 13, of the Wisconsin Constitution to the facts herein should be deemed to be a deprivation of property without due process of law, as guaranteed under the United States Constitution.

A trend of reversals of this doctrine has started to develop in other jurisdictions, but all have been predicated upon the courts reversing established public policy where no constitutional provisions similar to those of Wisconsin existed. See, *Dunlap v. Dunlap*, 84 N. H. 352, 150 A. 905 (1930); *Wells v. Wells*, (1932) (Mo. App.) 48 S. W. 2d. 109; *Young v. Rankin* (Scot.) (1934) Sc. 499, see digest of case in *Eng. & Emp. Dig. Cum. Sup. 1941, Infants*, page 150; *Cowgill v. Boock*, 189 Or. 282, 218 P. 2d. 445, 19 ALR 2d. 923 (1951); *Emery v. Emery*, 45 Cal. App. 2d. 421, 289 P. 2d. 218 (1955); *Nudd v. Matsoukas*, 7 Ill. App. 2d. 608, 131 N. E. 2d. 525 (1956); and *Sullivan v. Christienson*, 191 N. Y. S. 2d. 625 (1959).

It is further significant to note that despite the presentation of these Constitutional issues herein on two separate occasions, the Wisconsin Supreme Court has still not squarely considered and disposed of these issues, except for the remarks alluding to them contained in the concurring opinion of Justice Currie at 11 Wis. 2d. 97, 103.

It is contended that any attempt to continue the slavish following of the old antiquated rulings discussed previously

under the guise of following the established rule of the common law would amount, and be tantamount, to a denial of due process of law under the Federal Constitution to the injured minor petitioner.

It is pointed out in 41 Marquette Law Review, 188-199 (Fall, 1957) that it is difficult to reconcile the fact that the property rights of a minor are more zealously protected in law than are the rights of the person of minor, and yet if the current decision is permitted to stand, this is the inevitable consequence resulting. It is further stated in 33 St. John's Law Review, 310-320 (May, 1959) that at common law the minor was regarded as a separate legal entity fully responsible for his wrongs and entitled to the enjoyment of his own property. It would then be illogical to take this well established concept and throw it to the winds when it comes to the consideration of the rights of damages to the person of the minor.

Article *XIV*, Sec. 1, of the Amendments to the United States Constitution further provides that no one should be denied the equal protection of the laws. The adult injured person, as well as the emancipated minor, has a right to maintain the action in question in Wisconsin for recovery of damages for the personal injuries, but the decision of the Wisconsin Supreme Court denies this same right to the unemancipated minor. This class distinction, without any legal basis or foundation, constitutes a denial of the equal protection of the laws clause in the 14th Amendment of the U. S. Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted to review the judgment of the Supreme Court of the State of Wisconsin.

Respectfully submitted,

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APPENDIX

STATE OF WISCONSIN
IN SUPREME COURT

No. 315 August Term, 1959

VADA SCHWENKHOFF and
LONETTE SCHWENKHOFF,
by Guardian ad Litem, Vaughn S. Conway,
Plaintiffs-Appellants,

vs.

FARMERS MUTUAL AUTOMOBILE INSURANCE
COMPANY and SAUK COUNTY,
a Wisconsin Municipality,
Defendants-Respondents.

June 28, 1960

APPEAL from a judgment of the county court of Sauk County: ROBERT H. GOLLMAR, Judge. Affirmed in part; reversed in part.

Action to recover damages for personal injuries received in a collision of motor vehicles. One of the vehicles was a Chevrolet automobile driven by Orville Schwenkhoff, and the other was a truck with snowplow attached belonging to Sauk County and driven by one George Yonke. The plaintiff, Vada Schwenkhoff, is the wife of Orville Schwenkhoff, and the plaintiff Lonette Schwenkhoff is his infant daughter. The plaintiffs were guest passengers in the Schwenkhoff automobile. The above-entitled matter was

originally started by service of summons and complaint to which each of the defendants interposed a demurrer. The trial court in that case sustained the demurrer and appeal was taken to the supreme court. This court sustained the trial court's decision dismissing the complaint of the minor daughter with leave to the plaintiff to plead over.

The plaintiffs in their amended complaint set forth two separate causes of action. The first cause of action is that of Vada Schwenkhoff, the wife of Orville Schwenkhoff, and Lonette Schwenkhoff, his infant daughter, by her guardian ad litem. The second cause of action sets forth that Lonette Schwenkhoff is the infant daughter of Orville Schwenkhoff and realleges, reaffirms and incorporates the allegations of the first cause of action and then sets forth sec. 9, art. I, sec. 13, art. XIV of the Wisconsin Constitution, art. V of the amendments to the United States Constitution, and then sets forth that by virtue of the court rulings referred to in the complaint, the minor plaintiff has been and continues to be deprived of all her rights under the Wisconsin and United States Constitutions.

The defendants filed identical demurrers to the second cause of action on the ground that it does not state facts sufficient to constitute a cause of action against the defendant Sauk County, and demurred on the further ground that several causes of action had been improperly united. The trial court sustained the demurrers of the defendants, and on October 28, 1959, entered the following order granting the plaintiff the following three alternatives:

"(a) The action may be dismissed as to the plaintiff Lonette Schwenkhoff, and the first cause of action then

stand as the pleading in the matter, subject to answer or demurrer as the defendants may elect.

"(b) In addition to (a) set forth above, the plaintiff Lonette Schwenkhoff may submit a proposed amended complaint against the defendant Sauk County alone, and in the event that this alternative is followed, the two actions will then be split and set up as separate lawsuits which will result in an action of Vada Schwenkhoff against Farmers Mutual Automobile Insurance Company and Sauk County; and an action of Lonette Schwenkhoff, by guardian ad litem, against Sauk County.

"(c) If plaintiff does not follow either of the foregoing alternatives within thirty days from the date of this order, defendant shall have the right to move for judgment, and an order will be entered dismissing the action with costs to the defendants."

The order allowed the plaintiff or plaintiffs thirty days within which to file their amended pleadings. The order further provided that if the plaintiffs did not exercise the options extended to them by the court within thirty days, the defendant would have the right to move for dismissing the action with costs.

Forty-four days elapsed after the entry of the order of October 28, 1959, and the plaintiffs not having filed any amended pleadings in the action, the defendants moved for judgment dismissing the action returnable on December 11, 1959. The trial court granted the motion for judgment and judgment was entered on December 11, 1959, dismissing the complaint of the plaintiffs as to both causes of action with costs in the amount of $100.00 to be paid to each of the defendants by the plaintiffs.

It is from this judgment that the plaintiffs appeal.

The constitutional provisions involved in the second cause of action are as follows:

Sec. 9, art. I of the Wisconsin Constitution provides as follows:

> "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

Sec. 13, art. XIV of the Wisconsin Constitution provides as follows:

> "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

Art. V of the amendments to the United States Constitution provides as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

Sec. 1, art. XIV of the amendments to the United States Constitution provides as follows:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

For the appellants there were briefs by Vaughn S. Conway and Kenneth H. Conway, both of Baraboo, attorneys, and Irving D. Gaines of Milwaukee of counsel, and oral argument by Vaughn S. Conway.

For the respondents there was a brief by Langer & Cross of Baraboo, and James R. Seering, district attorney of Sauk County, and oral argument by Mr. Clyde C. Cross, Mr. H. M. Langer and Mr. Seering.

Opinion by Justice Dieterich: This action comes before us a second time. SCHWENKHOFF v. FARMERS MUT. AUTOMOBILE INS. CO. (1959), 6 Wis. (2d) 44, 93 N. W. (2d) 867. In that case Mr. Justice Broadfoot stated:

(p. 45) "In *Wick v. Wick* (1927), 192 Wis. 260, 212 N. W. 787, this court determined that an unemancipated minor cannot maintain an action in tort against its parent for personal injury sustained in an automobile accident due to the negligence of the parent. That rule has been consistently followed in this state since that time."

(p. 46) "A careful reading of the decisions in the cases cited above will show that there has been no relaxation or modification of the rule pronounced in the *Wick* Case. In some of the decisions attention is called to the fact that the *Wick* decision was based upon public policy; that matters of public policy are to be resolved by the legislature, and the attention of the legislature was directed to the matter in those decisions. The legislature as late as 1957 failed to enact a bill designed to change the rule."

The 1958-1959 legislature has likewise failed to enact a bill designed to change the rule. This constitutes an

expression by the legislature that no change should be made in the rule.

The so-called new allegations contained in the amended complaint recite constitutional provisions which the minor child claims gives her a right to maintain a cause of action against her father's automobile insurance company as well as Sauk County. These issues were considered by this court in its decision of January 2, 1959, when it affirmed the order of the trial court dismissing the complaint as to the minor, Lonette Schwenkhoff, with leave to plead over.

The trial court in its order and judgment dismissed both plaintiffs' causes of action against the defendants, Farmers Mutual Automobile Insurance Company and Sauk County.

The plaintiff, Vada Schwenkhoff, has an action against the Farmers Mutual Automobile Insurance Company and Sauk County, and Lonette Schwenkhoff, the minor, has an action against Sauk county. It is our opinion that justice to the parties plaintiff requires the exercise of our discretionary power to reverse that part of the judgment dismissing the complaint of Vada Schwenkhoff against the defendants Farmers Mutual Automobile Insurance Company and Sauk County, a municipality, and the action of Lonette Schwenkhoff, by her guardian ad litem Vaughn S. Conway, against Sauk County, a Wisconsin municipality, defendant, and reinstate the three alternatives contained in the trial court's order dated October 28, 1959, plaintiffs to exercise such option within thirty days from the date of the remittitur.

By the Court—The judgment in so far as it dismisses the complaint of Lonette Schwenkhoff, by her guardian ad litem, against the Farmers Mutual Automobile Insurance Company is affirmed. In all other respects the judgment is reversed, and the trial court is directed to reinstate the three alternatives of its order dated October 28, 1959, plaintiffs to exercise such option within thirty days from the date of the remittur.

HALLOWS, J., took no part.

CURRIE, J. (concurring). The appellants' brief points out that, while our opinion in the first appeal stated that the contention had been raised that sec. 9, art. I, Wisconsin Constitution, which provides that every person is entitled to a certain remedy in the laws for all injuries or wrongs that he may receive in his person, governed the plaintiff minor's right to recover, nevertheless such opinion failed to pass on such issue. Again, although the same contention is vigorously advanced on this second appeal, the opinion of the court fails to advance any reason why such contention is not a meritorious one.

The opinion on the first appeal, after making note of the contentions advanced, stated (6 Wis. (2d) 44, 46, 93 N. W. (2d) 867):

> "The subject has received the attention of this court in later cases, among which are *Zutter v. O'Connell*, 200 Wis. 601, 229 N. W. 74; *Segall v. Ohio Casualty Co.*, 224 Wis. 379, 272 N. W. 665; and *Lasecki v. Kabara*, 235 Wis. 645, 294 N. W. 33."

None of the three above-cited cases makes any mention of sec. 9, art. I, Const. However, Mr. Justice CROWNHART grounded his dissent in *Wick v. Wick* (1927), 192 Wis. 260,

263, 212 N. W. 787, upon this constitutional provision, but the majority opinion makes no mention of the same. The only reason that comes to mind for such omission in the majority opinion is that the dissent may have been filed after the majority opinion had already been handed down.

While the majority of this court apparently has never directly stated why sec. 9, art. I, Const., does not confer a cause of action upon a minor child to recover for injuries caused by the tort of a parent, there are a number of past decisions of this court which do deal with this constitutional provision, and lay down the principle which governs the instant appeal.

In the recent case of *Firemen's Insurance Co. v. Washburn County* (1957), 2 Wis. (2d) 214, 85 N. W. (2d) 840, the argument was advanced that this same constitutional provision abolished the common-law immunity of all governmental units from liability for negligence. After citing and considering the earlier Wisconsin cases bearing on the application of sec. 9, art. I, Const., we concluded that such provision must be construed in the light of the common law as it stood at the time of the adoption of the constitution in 1848. It was held that the framers of the constitution in drafting sec. 9, art. I, had no thought in mind of thereby abolishing an immunity from suit that then existed. While in *Firemen's Ins. Co. v. Washburn County, supra*, we were dealing with the tort immunity of governmental units, the same reasoning is equally applicable to the immunity from suit for negligence of a parent for injuries caused his child. See also *McCoy v. Kenosha County* (1928), 195 Wis. 273, 218 N. W. 348, 57 A. L. R. 412.

We note that the legislature at its 1959 session refused to enact a statute abolishing the immunity of a parent to respond in damages to a child injured through the wrongful act of the parent. Bill 250, A., was introduced in the assembly, and Bill 89, S., was introduced in the senate, to accomplish such result. Each was accorded the fate of indefinite postponement by the house in which it originated. This further definite expression of legislative action is controlling upon this court in a policy matter of this kind. As we pointed out in *Scholberg v. Itnyre* (1953), 264 Wis. 211, 58 N. W. (2d) 698, the creation of new causes of action in behalf of children presents a question of policy which properly lies within the province of the legislature and not this court.

I am authorized to state that Mr. Justice BROWN joins in this concurring opinion.

In The

Supreme Court of the United States

October Term, 1960

No. 434

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

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No. 434

LONETTE SCHWENKHOFF, by
Guardian ad Litem, Vaughn S. Conway,

Petitioner,

vs.

FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

6 Wis. 2d 44, 93 N. W. 2d 867, rendered January 2, 1959, affirmed Order sustaining demurrer to entire complaint, with leave to plead over.

11 Wis. 2d 97, 104 N. W. 2d 154, rendered June 28, 1960, affirmed Judgment dismissing amended complaint by infant plaintiff as to father's insurer only, and extended option to infant and her co-plaintiff mother to replead their other causes of action stated.

Jurisdiction

Petitioner contends jurisdiction is conferred by 28 U. S. C. 1257 (3). Respondent contends that jurisdiction should not be accepted by this court because:

a) No substantial federal question is presented.

b) There are adequate non-federal grounds to support the Wisconsin court's decision.

c) To do so would constitute an unconstitutional assumption of power by this court over the State.

Questions Presented

1. May Wisconsin law constitutionally bar an unemancipated minor from recovery in its courts for personal injuries occasioned by the negligence of her father?

2. Does the XIV Amendment contemplate that this court shall review state court decisions duly decided under state law to determine whether it considers that they were correctly decided?

ARGUMENT

I.

NO FEDERAL QUESTION WAS PRESENTED BY THIS PURELY INTRASTATE CONTROVERSY, BROUGHT AND DECIDED UNDER STATE LAW.

This is a civil action brought by a Wisconsin citizen in the Wisconsin courts to recover from a Wisconsin corporation for injuries received in Wisconsin under the provisions of a contract of automobile insurance written in Wisconsin. It was decided by the Wisconsin Supreme Court on the basis of established Wisconsin law.

A. Local Law Clear.

The rule that an unemancipated minor may not recover for ordinary negligence of his parent was first enunciated by the Wisconsin court in *Wick* v. *Wick* (1927) 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113, and was followed in *Zutter* v. *O'Connell* (1930) 200 Wis. 601, 229 N. W. 74. It was specifically extended to the parent's insurer in *Segall* v. *Ohio Casualty Co.* (1937) 224 Wis. 379, 272 N. W. 665, 110 A. L. R. 82, and *Lasecki* v. *Kabara* (1940) 235 Wis. 645, 294 N. W. 33, 130 A. L. R. 883. This rule was subsequently re-examined and re-affirmed in *Fidelity Savings Bank* v. *Aulik* (1948) 252 Wis. 602, 32 N. W. 2d 613, and *Wadoz* v. *United National Indemnity Co.* (1957) 274 Wis. 383, 80 N. W. 2d 262, which extended the rule to actions of parent v. child.

The Wisconsin legislature has clearly manifested its concurrence in the wisdom of this court-made rule, and the soundness of the public policy considerations from which it springs. In the decisions cited immediately above, the Wisconsin Supreme Court repeatedly directed critics of parental immunity to the legislature, declaring that any change in the firmly established judicial rule should properly come from the legislature, particularly since fundamental questions of public policy were involved. Yet, our legislature has never seen fit to alter the rule as announced and applied by the Court.

Just before this action was begun the 1957 Wisconsin legislature had refused to enact a bill specifically designed to abrogate the rule (Bill No. 689A, Senate Journal 1957 p. 1794). After the first decision in this case re-affirming the court's adherence to the rule, and containing a special concurring opinion expressly inviting legislative action, a bill to change it was introduced in the 1959 legislature. But this, too, was decisively defeated. (Bill No. 89S, Wis. Sen. Bulletin 1 30 60 p. 87, Journal of the Senate 4 23 59 at p. 607).

Thus, it is clear that the judgment under attack here is not only amply supported by Wisconsin law, but was clearly compelled by the state of Wisconsin authorities. And it is therefore valid unless this court is to now say to the state of Wisconsin that it will not be permitted to continue to follow the rule of law which its court has consistently adhered to with the manifest approval of its legislature.

B. Local Law Controls

And we respectfully submit that this court may not properly make any such pronouncement to the Wisconsin court, under the authority of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

That case also presented the problem as to whether an individual injured through negligence could be barred from a recovery by a state court rule. Tompkins was struck by an Erie train while trespassing on railroad property under circumstances whereby the railroad was found negligent. It was contended that the rule in Pennsylvania was that a trespasser could not recover for ordinary negligence on the part of the landowner. This court, in its now classic opinion, held that the federal courts were compelled by the U. S. Constitution to accept and apply this rule of substantive tort law of the state, even though the federal courts considered the Pennsylvania rule barring recovery to be an incorrect view of the law.

In Mr. Justice Brandeis' opinion for this court in the *Tompkins* case he said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." (304 U. S. at 78)

He further quoted with approval the prior statement of Mr. Justice Holmes that for this Court to refuse to accept the local law, as established by the state courts, was "an unconstitutional assumption of powers by courts of the United States . . ." (304 U. S. at 79)

We submit that if the federal courts must follow the local state law in these matters when brought in federal court, then it necessarily follows as an *a fortiori* proposition that the federal court must also permit the state courts to follow their own laws in deciding their own cases.

C. *No Violation of XIV Agreement*

Petitioner contends that this court should intervene here because the rule of parental immunity is legally unsound and the Wisconsin court's adherence to it therefore results in her being deprived of her property without due process of law, in violation of the XIV Amendment. But this contention requires consideration as to what is meant both by "property" and by "due process."

Due Process

Certainly, this petitioner has been afforded "due process," in the Wisconsin courts which have been dealing with her case over the past two and one-half years, with two separate reviews by the highest court in the state. We submit that due process may not properly be extended to incorporate the concept of the right to a favorable, or even a legally correct, decision; but rather, that it goes only to the process whereby the decision is reached.

To hold otherwise would emasculate the fundamental concept of *Erie R. Co. v. Tompkins*. For to say that an "incorrect" decision by a state court is a violation of due process is to say that this court may review every decision of every state court to determine whether it considers that the case was correctly decided, and therefore constituted due process. And whenever this court disagreed with the result in the state court it could then impose its view of the law on the state by simply declaring this was required by the constitutional guarantee of due process.

We also suggest that *Erie R. Co. v. Tompkins* indirectly, but necessarily, negates petitioner's contention that a bar to recovery based on an incorrect view of the law by the state court is a violation of due process. For there this Court did not question the lower federal court's view that the Pennsylvania rule was not the correct rule of law, but still held that the Constitution required that that rule be accepted and applied.

Deprivation of Property

As far as the claim of deprivation of property is concerned,—where has plaintiff been deprived of any "property" rights?

She claims a cause of action which the Wisconsin court has never recognized to exist, either by decision or statute. There is no claim that petitioner has a cause of action against her father under any federal statute or specific provision of the Constitution; and, as pointed out by Justice Brandeis in the portion of the *Tompkins* opinion quoted

above, there is no such thing as a federal general common law under which such cause of action could arise.

So, we submit, unless and until Wisconsin law recognizes that there is a cause of action in this minor injured by the negligence of her father, then there is no "property" right for her to be deprived of.

This is particularly true here since petitioner seeks to recover in tort. And, "Liability for a tort depends upon the law of the place of injury." *Young* v. *Masci*, 289 U. S. 253 at 258, 77 L. ed. 1158 at 1160, 53 S. Ct. 599. Thus, tort law runs through the spectrum from strict liability in certain cases to absolute immunity in others, with a myriad of shadings in between. The hue of the particular rule of tort law to be applied in each specific situation is in essence but a reflection of the public policy considerations involved in the particular circumstances presented as viewed in the light of the "felt necessities of the time" then prevailing in the jurisdiction involved.

There are many other examples where the law of tort declines to permit a recovery even though recognizing that damage flowed from the negligent act of another, e.g.: legal cause and scope of duty concepts, host-guest and husband-wife limitations and bars, death and survival statutes, contributory negligence, comparative negligence, assumption of risk, charitable and governmental immunities, etc. And there is a great variation in the applicable rules from jurisdiction to jurisdiction, and from time to time. Yet, these local bars to, and restrictions on, recovery do not constitute a violation of the federal Constitution.

Thus, in *Silver* v. *Silver*, 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A. L. R. 939, this Court held that Connecti-

cut could constitutionally abrogate the existing common law cause of action of a gratuitous passenger in an automobile against the driver for injuries resulting from ordinary negligence. And, Arkansas was permitted to bar recoveries by a guest in an automobile if the injured guest was related to the negligent driver within the third degree, despite the assertations of all of the same constitutional objections advanced here. *Harlow* v. *Ryland* (8th CCA), 172 F. 2d 784. Also, the Massachusetts law that one traveling on Sunday could not recover from the railroad for the negligence of its servants was upheld. *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, 31 L. ed. 795, 8 S. Ct. 974.

D. *Not Unconstitutional Class Distinction*

Petitioner alleges that she as an unemancipated minor, has been denied equal protection of the laws through "This class distinction without any legal basis or foundation" (p. 9). But the XIV Amendment does not require a "legal basis" for the establishment of class distinctions by a state in the administration of its local tort law.

The equal protection clause does not require things which are different in fact or opinion to be treated in law as though they were the same. *Tigner* v. *Texas*, 310 U. S. 141 at 147, 84 L. ed. 1124, 60 S. Ct. 879, 130 A. L. R. 1321. And the ultimate test of constitutional validity is not whether the treatment of classes differs, but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Asbury Hospital* v. *Cass County*, 326 U. S. 207 at 214, 90 L. ed. 6, 66 S. Ct. 61. Thus, the equal protection clause of the XIV Amendment

voids what is done by a state only wher its action is without any reasonable basis and is purely arbitrary. *Morey* v. *Doud*, 354 U. S. 457 at 463, 1 L. ed. 2d 1485, 77 S. Ct. 1344.

Furthermore, the state's power to classify is recognized to be extremely broad, limited only by the doctrine that a classification may not be palpably arbitrary. *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U. S. 376, 4 L. ed. 2d 384 at 390, 80 S. Ct. 474. And this Court does not concern itself with the wisdom or soundness of distinctions drawn by the states in their classifications, but will look only to see if the local authorities, judicial or legislative, have some reasonable basis for their belief that the distinction is advisable. *Safeway Stores* v. *Oklahoma Retail Grocers Association*, 360 U. S. 334, 3 L. ed. 2d 1280, 79 S. Ct. 1196.

Petitioner contends that the Wisconsin Court's continued adherence to the doctrine of parental immunity should be struck down as an unconstitutional denial of the minor's rights because this is an "old antiquated" social concept (p. 8). But this Court in upholding a Michigan law restricting female bartender licenses to wives and daughters of licensed owners in cities of over 50,000 said:

> "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards * * *."
>
> *Goesaert* v. *Cleary*, 335 U. S. 464 at 466, 93 L. ed. 163, 69 S. Ct. 198.

Here the Supreme Court of Wisconsin, in consort with its legislature and sister courts, has concluded that the public policy to promote and protect family unity requires this distinction between minors who are dependent upon

their parents for support and those who are not. And it has said to the former: you may not bite the hand that feeds you. The bar applies with equal force to all unemancipated minors. And as long as a law applies to all members of a class alike, the constitutional requirements of equal protection are met. *Louisiana* v. *Resweber*, 329 U. S. 459 at 465, 91 L. ed. 422, 67 S. Ct 374. Also, unemancipated minors, and they alone, receive the benefit of the inverse immunity to tort suits by their parents.

Whether or not this court considers that the distinction thus drawn by the Wisconsin court is necessary or wise, we submit that it cannot be said to be so wholly without rational basis, so palpably arbitrary, as to warrant its being struck down as unconstitutional.

We further suggest that most of the authorities and considerations set forth above in the considerations of due process and invasion of property rights also support our position here. If, for example, Connecticut may draw the line between paying and non-paying guest, Arkansas may further subdivide non-paying guest at the 3rd and 4th degree of kinship, and Massachusetts may extend or retract liability upon the basis of a tick of the clock,—why may not Wisconsin draw this distinction between minors who are independent of and those who are dependent upon the parent they seek to sue?

E. V *Amendment Not Involved*

Petitioner also claims she was denied due process under the V Amendment. But, this amendment protects only against invasion of rights by the federal government, whose

conduct alone it limits. *Feldman* v. *U. S.*, 322 U. S. 487 at 490, 88 L. ed. 1408, 64 S. Ct. 1082, 154 A. L. R. 982. Since the complaint here is directed solely against the action of the Wisconsin court, with no claim of any impropriety by any federal court or agency, the contentions based on the V Amendment cannot be maintained.

F. *State Constitution Not Involved*

Petitioner's further contentions that the Wisconsin court has misconstrued the Wisconsin Constitution are also irrelevant in this court. For the Wisconsin court is the final authority as to the construction of the Wisconsin Constitution, and its construction of the state constitution is binding on this Court. *Louisiana* v. *Resweber*, 329 U. S. 459, 91 L. ed. 422, 67 S. Ct. 374.

II.

THERE IS NO CONFLICT IN THE AUTHORITIES.

The doctrine of parental immunity in tort cases is not only firmly entrenched in the law of Wisconsin, but it is supported by the overwhelming weight of authority throughout the United States, viz.:

> "As a general rule, in the absence of a statute to the contrary, an unemancipated minor child has no right of action against a parent for the tort of such parent."
>
> 67 C. J. S. 787 *Parent & Child* Sec. 61 (b) (2).

See also 39 Am. Jur. 735 *Parent & Child* Sec. 90; 19 A. L. R. 2d 423, and supplements thereto.

The extension of the immunity to the parent's insurance carrier by Wisconsin, upon the fundamental premise of liability insurance law that the company is not liable if its assured is not, is also in accord with the overwhelming weight of present-day authority. 67 C. J. S. at 788; 39 Am. Jur. at 736; 19 A. L. R. 2d at 435.

Petitioner's brief, at page 8, speaks of "a trend of reversals of this doctrine (that) has started to develop in other jurisdictions." But examination of the cases cited in support of the claimed trend away from the rule of parental immunity discloses that these cases are not in point here as they did not involve a situation of ordinary negligence causing injury to an unemancipated minor in a straight parent-child relationship. Most of these cases squarely recognize the doctrine of parental immunity to be the established law of the land, and then set out to carve an exception to that general rule under the particular circumstances presented there but not involved here.

A review of the most recent decisions on the point, collected in 1960 A. L. R. 2d Supp. Service at pp. 1612-1615, demonstrates that this rule is as firmly entrenched today as at any time since its inception. In fact, the adherence to the rule in the last twenty years in these ordinary negligence automobile accident cases has been universal throughout the country.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for Writ of Certiorari should be denied.

Respectfully submitted,

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